UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ESTATE OF SILVIO RAVETTI, DECEASED, DONNA IRENE LOGAN, EXECUTRIX,	)
Petitioner,	)
V.	)
COMMISSIONER OF INTERNAL REVENUE,	)
Respondent.	)

Docket No. 19854-86

ORDER

Background

This was the case was set for trial at the trial session that began on April 19, 1993, in San Francisco, California. Upon appearance at the April 19, 1993 calendar call, respondent moved for entry of decision. Respondent's motion was filed as a motion for summary judgment and petitioner was ordered to respond to such motion on or before May 19, 1993. Petitioner's memorandum in opposition t respondent's motion for summary judgment and her own summary judgment motion was filed, after an extension, on June 21, 1993. In response to petitioner's motion, respondent filed a notice of objection on July 20, 1993. These respective motions for summary judgment will be addressed in a separate order and decision.

On June 16, 1993, respondent issued a notice of levy to petitioner for tax years 1981 and 1982. In response, on July 15, 1993, petitioner filed a motion to restrain assessment and collection under Tax Court Rule 55. A telephonic conference call was held with both parties on July 19, 1993, to discuss petitioner's motion. In that discussion, respondent's counsel called our attention to a closing agreement executed and signed by both parties which contained a waiver by petitioner of the restrictions contained in section 6213(a) prohibiting assessment and collection of deficiencies (Exhibit F attached to petitioner's motion to restrain). Per our discussion, respondent filed an objection to petitioner's motion to restrain with a memorandum of law in support on July 20, 1993. Petitioner replied to respondent's memorandum on July 23, 1993.

In addition, on July 23, 1993, petitioner filed a motion for relief from stipulation alleging respondent had breached the agreement by instituting collection. Respondent filed a notice of objection on July 27, 1993.

Motions for Relief from Stipulation and to Restrain Assessment & Collection

In her motion for relief from stipulation, petitioner requests a rescission of the stipulation of partial agreement, upon which the closing agreement is based. Petitioner alleges that respondent has breached both the closing agreement and the stipulation by instituting collection action while this case is before this Court.

In her motion to restrain, petitioner argues that it was not the intention of the parties, in executing the stipulation of partial agreement and the closing agreement, to waive the restriction on assessment and collection. More specifically, petitioner alleges that a mutual mistake exists in this case and therefore the waiver was invalid. Petitioner claims that she was unaware of the waiver provision upon signing the closing agreement and that respondent similarly did not intend that the waiver be included. In the alternative petitioner asserts that a unilateral mistake exists on her part and therefore, respondent should not be allowed to profit from "the cleverness of its representatives."

Conversely, respondent argues that petitioner voluntarily entered into the written agreements at issue. Respondent contends that she did intend to include the waiver provision, thus negating the possibility of a mutual mistake. Furthermore, respondent contends that if petitioner made a unilateral mistake in executing the agreements, it is not adequate grounds for rescission. Therefore, respondent concludes that her assessment of tax and collection efforts are proper and in accordance with those agreements.

Respondent has assessed the deficiencies in tax and undertaken collection actions for tax years 1981 and 1982. Pursuant to section 6213(a), we have jurisdiction only over petitioner's motion insofar as it relates to tax year 1982. See Kamholz v. Commissioner, 94 T.C. 11 (1990).

The waiver, as contained in the closing agreement executed and signed by both parties, reads:

9. The parties agree that with respect to any deficiencies in income tax attributable to the items set forth in paragraphs 1 through 8 above:

a. The taxpayers waive the restrictions contained in Section 6213(a) prohibiting assessment and collection of the deficiencies (plus statutory interest); and

b. The taxpayers waive, pursuant to Section 6224(b), the restrictions contained in Section 6225(a) prohibiting the assessment and collection of deficiencies (plus statutory interest) to the extent that these items are subject to the provisions of Section 6221 through Section 6233, including those items which become non-partnership items pursuant to Section 6231(b)(1)(C) by the execution of this closing agreement by both parties. [emphasis in original]

In both the closing agreement and the stipulation of partial agreement, the parties resolved issues related to petitioner's investment in Glenstall Petroleum. For tax year 1982, petitioner conceded that 100 percent of the deficiency was attributable to her investment in the Oil and Gas Partnership. Furthermore, petitioner conceded liability under section 6621(c) for additional interest on substantial underpayments attributable to tax-motivated transactions. Respondent conceded that no additions to tax would be imposed under sections 6653(a), 6659, or 6661.

The executed closing agreement and partial stipulation were mailed to respondent's counsel with a cover later dated August 17, 1992, by petitioner's counsel, Richard H. Foster. We assume Mr. Foster read the agreement and advised petitioner to sign it. Both Mr.Foster and petitioner signed the partial stipulation filed with the Court on August 28, 1992. The closing agreement was executed by petitioner on July 27, 1992, and by respondent on September 23, 1992.

When interpreting an agreement, the Court cannot ignore the plain language of the written document. Although the intention of the parties is foremost, the outward manifestations of those intentions is controlling. Superior Oil Co. v. Western Slope Gas Co., 604 E.2d 1281, 1289 (10th Cir. 1979) (citing Quad Const., inc. v. Wm. A Smith Contracting Co., 534 E.2d 1391, 1394 (10th Cir. 1976).

Under California law, even if the written agreement of the parties is clear and unambiguous on its face, the trial judge must consider relevant extrinsic evidence that can prove a meaning to which the language of the contract is not reasonably susceptible. However, if after considering extrinsic evidence the Court finds the language of the contract is not reasonably susceptible to the asserted interpretation and is unambiguous, extrinsic evidence cannot be received for the purpose of varying the terms of the contract. The Court must look to the objective, rather than subjective, criteria in determining the intent of the parties. U.S. v. King

Features Entertainment, Inc., 843 F.2d 394,398 (9th Cir. 1988) (citing Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 871-873 (9th Cir. 1979)). In the absence of fraud or mutual mistake, any attempt to assert a prior unilateral and private intention is foreclosed because the subjective, unexpressed and uncommunicated intentions of a party to the contract are inconsequential. United California Bank v. THC Financial Corp., 557 F.2d 1351, 1360 (9th Cir. 1977) (citing Union Bank v. Winnebago Indus., Inc., 528 F.2d 95, 99 (9th Cir 1975).

It is well establised that if a petition has been filed with the Tax Court, no assessment of a deficiency in tax or levy for its collection may be made until the decision of the Tax Court has become final. Sec. 6213(a); Kamholz v. Commissioner, supra at 15. However, section 6213(d) provides an exception to this general rule:

The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided for in subsection (a) [section 6213(a)] on the assessment and collection of the whole or any part of the deficiency.

The purpose of section 6213 (d) is to permit the taxpayer to pay his taxes and to permit the Government to get its money without delay. Moore v. Cleveland Ry. Co., 108 F.2d 656,659 (6th Cir. 1940). A taxpayer's waiver of the prohibition against assessment or collection until the finality of the Tax

Court decision authorizes respondent to assess the tax immediately. United States v. Price, 361 U.S. 304 (1960); Pesko v. United States, 918 F.2d 1581 (Fed. Cir. 1990). Immediate payment may benefit the taxpayer as well as the government because it stops the running of interest.

A waiver cannot be withdrawn, once acted upon, and assessment is made in accordance with its terms. Sec. 301.6213-1(d), Income Tax Regs. A waiver executed under a unilateral mistake of fact by the taxpayer cannot be set aside in absence of fraud or duress. Quigley v. Internal Revenue Service, 289 F.2d 878, 880 n.5 (D.C. Cir. 1960). Similarly, "one cannot enter into a contract and, when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained." G. L. Webster Co. v. Trinidad Bean & Elevator Co., 92 F.2d 177, 179 (4th Cir. 1937).

Moreover, closing agreements are binding on the parties as to the terms agreed upon, including waiver provisions, and may not be annulled, modified, set aside or disregarded in any suit or proceeding unless there is a showing of fraud, malfeasance, or misrepresentation of material fact. Sec. 7121(b); Estate of Magarian v. Commissioner, 97 T.C. 1, 5-6 (1991) (citing Zaentz v. Commissioner, 90 T.C. 753, 760-761 (1988).

In accordance, we find from examination of the closing agreement and the stipulation of partial agreement, and the arguments advanced by the parties

that the intention of the parties, upon execution, was to include the waiver agreement in the document. The language of these agreements, specifically the waiver provision, is not ambiguous. Because the agreements are unambiguous in their faces, evidence of petitioner's mistake cannot be admitted to vary the terms of either agreement. U.S. v. King Features Entertainment, Inc., supra. Because petitioner has failed to prove that her alleged unilateral mistake of fact was due to fraud, duress, or misrepresentation by respondent, we find her bound by the waiver provision and the remaining terms in both agreements. Her mere failure to become acquainted with an agreement which she signed is not adequate grounds to rescind or reform the agreement. Quigley v. Internal Revenue Service, supra. Therefore, we conclude that respondent's notice of levy and any collection efforts pursuant to that notice are valid under section 6213(d) and do not constitute a breach of either agreement.

In accordance, it is

ORDERED that petitioner's motion for relief from stipulation is denied. It is further

ORDERED that petitioner's motion to restrain assessment and collection under Tax Court Rule 55 is similarly denied. Respondent's issuance of a Notice of Levy was proper under section 6213(d).

Carolyn Miller Parr
Judge